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DAVID SWING, and LARRY COX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO

PETER MCNEFF, an individual,
Plaintiff,

v.

THE CITY OF PLEASANTON, a
City within the State of California;
THE PLEASANTON POLICE
DEPARTMENT, a Division of
defendant City; DAVID SWING,
an individual; LARRY COX, an
individual; BRIAN DOLAN, an
individual; and DOES 1-10,
individuals,

Defendant.

Case No.:
3:23-cv-00106-AMO

Complaint Filed: January 10, 2023

**DEFENDANTS' NOTICE OF MOTION
AND MOTION TO DISMISS SECOND
AMENDED COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES**

[Filed concurrently with Request for
Judicial Notice; [Proposed] Order re Motion
to Dismiss; and [Proposed] Order re Request
for Judicial Notice]

Date: March 7, 2024
Time: 2:00 p.m.
Ctrm: 10

TO THE CLERK OF THE ABOVE-ENTITLED COURT, ALL PARTIES
AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on Thursday, March 7, 2024,¹ at 2:00 p.m., or
as soon thereafter as counsel may be heard in Courtroom 10, of the above-entitled

¹ This was the earliest date available on the Court's calendar, which also allows time for
Plaintiff's Opposition and Defendants' Reply.

1 Court, Defendants THE CITY OF PLEASANTON (“City”), a City within the State
 2 of California; DAVID SWING (“Chief Swing”), an individual; and LARRY COX
 3 (“Captain Cox”), an individual (Chief Swing and Captain Cox are referred to
 4 collectively as “Individual Defendants” where appropriate, and the Individual
 5 Defendants and City are referred to collectively as “Defendants”), will and hereby
 6 do move this Court, pursuant to Federal Rule of Civil Procedure 12(b)(6), for an
 7 order dismissing the claims in PETER MCNEFF’S (“Plaintiff”) Second Amended
 8 Complaint in their entirety and without leave to amend. The Motion is based on the
 9 following grounds:

- 10 1. Plaintiff’s first claim against Captain Cox fails to state a claim upon
 11 which relief can be granted. *Bell Atlantic Corp. v. Twombly*, 550 U.S.
 12 544, 570 (2007).
- 13 2. Plaintiff’s first claim against the Individual Defendants fails because the
 14 Individual Defendants are entitled to qualified immunity. *Saucier v.*
 15 *Katz*, 533 U.S. 194, 201 (2001).
- 16 3. Plaintiff’s second claim against the City fails to state a claim upon which
 17 relief can be granted and Plaintiff does not plead a constitutional right
 18 violation resulting from (1) an employee acting pursuant to an expressly
 19 adopted official policy; (2) an employee acting pursuant to a longstanding
 20 practice or custom; or (3) an employee acting as a “final policymaker.”
 21 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Monell v.*
 22 *Department of Social Services*, 436 U.S. 658, 694 (1978).

23 Defendants’ Motion will be based on this Notice and Motion, the
 24 Memorandum of Points and Authorities, Defendants’ Request for Judicial Notice,
 25 all pleadings and papers filed by the parties herein, and any other oral and

26 ///

27 ///

documentary evidence presented at or before the hearing on this Motion.

Dated: January 23, 2024

LIEBERT CASSIDY WHITMORE

By /S/ Nicholas M. Grether

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MEMORANDUM OF POINTS AND AUTHORITIES

Defendants THE CITY OF PLEASANTON (“City”), a City within the State of California; DAVID SWING (“Chief Swing”), an individual; and LARRY COX (“Captain Cox”), an individual (Chief Swing and Captain Cox are referred to collectively as “Individual Defendants” where appropriate, and the Individual Defendants and City are referred to collectively as “Defendants”), hereby submit the following Memorandum of Points and Authorities in Support of their Motion to Dismiss Plaintiff PETER MCNEFF’S (“Plaintiff”) Second Amended Complaint (“SAC”) pursuant to Federal Rule of Civil Procedure 12(b)(6).

I. INTRODUCTION

Plaintiff alleges that, on or about January 7, 2021, the Pleasanton Police Department (“PPD”) received a complaint from a City police officer that Plaintiff was a member of the “Proud Boys,” who were accused of organizing the unprecedented events in Washington, D.C., on January 6, 2021. Another officer in the PPD submitted another complaint on January 10, 2021, related to information found on Plaintiff’s Facebook page. Following the January 10 complaint, Plaintiff was placed on leave pending an investigation. An investigation determined that Plaintiff had attended the “Stop the Steal” rally in Sacramento, CA, not Washington, D.C., but had not engaged in misconduct by doing so. However, the investigation sustained other violations of City and PPD policies.

After the investigation, Plaintiff was terminated from his position as a police officer based on the sustained allegations in the investigation report. Pursuant to the applicable MOU, Plaintiff challenged his termination, which was overturned in arbitration, and he has since returned to work in the PPD.

Plaintiff filed this SAC, alleging violations of the First Amendment (via 42 U.S.C. § 1983) against the Individual Defendants and the City. Plaintiff’s SAC should be dismissed in its entirety for several reasons.

For the first claim against the Individual Defendants, they are entitled to qualified immunity, for their discretionary actions. The SAC alleges the Individual Defendants performed standard personnel actions, such as informing an investigation subject about an investigation and deciding to recommend termination for violation of policies. For the second claim, Plaintiff does not identify a policy, custom, failure to train, or decision by a final policymaker to support the City's liability under the First Amendment. This is essential to hold a municipality liable under 42 U.S.C. section 1983. Thus, Plaintiff's second claim fails against the City.

For these reasons, Defendants request that the Court dismiss the SAC without leave to amend.

II. FACTS¹

On January 6, 2021, Plaintiff attended a "Stop the Steal" rally in Sacramento, California. SAC at ¶ 10. He posted pictures of himself and his wife at the rally on his personal Facebook page. *Id.* A City police officer sent a memo to Chief Swing on January 7, 2021, accusing Plaintiff of being a member of the "Proud Boys." *Id.* at ¶ 12. Another officer searched Plaintiff's social media and sent a complaint to the City on January 10, 2021. *Id.* at ¶ 16.

In March 2021, the PPD launched an internal affairs investigation. SAC at ¶ 18. Chief Swing delegated the investigation to Captain Cox, and an outside law firm investigated five separate allegations against Plaintiff. *Id.* at ¶ 20. The outside law firm interviewed several PPD officers with respect to each of the five allegations. *Id.* at ¶¶ 21-22.

The outside investigation sustained two findings against Plaintiff for violations of PPD and City policies. SAC at ¶¶ 22-23, Ex. A. The City's termination of Plaintiff was overturned in arbitration pursuant to Plaintiff's rights in the MOU. *Id.* at ¶ 25.

¹ Defendants neither admit nor deny the accuracy of the facts set forth in the SAC. The operative facts as alleged in Plaintiff's SAC are set forth for the purpose of this Motion.

1 In this lawsuit, Plaintiff seeks compensatory damages, emotional distress
2 damages, interest, costs, and attorneys' fees. SAC at p. 11:13-17.

3 **III. PROCEDURAL HISTORY**

4 Plaintiff filed his original Complaint in this Court on January 10, 2023.
5 Plaintiff filed an Amended Complaint on May 1, 2023, and Defendants filed a
6 Motion to Dismiss. The Court granted the Motion to Dismiss on November 30,
7 2023, with leave to amend. Plaintiff filed his SAC on January 9, 2024. The SAC
8 alleges the following claims:

- 9 1. 42 U.S.C. § 1983/First Amendment Retaliation against the Individual
10 Defendants; and
- 11 2. 42 U.S.C. § 1983/First Amendment Retaliation against the City.

12 **IV. LEGAL STANDARD**

13 A complaint is properly dismissed if the facts contained therein are
14 insufficient to state a claim upon which relief may be granted. Fed. R. Civ. P.
15 12(b)(6). In deciding a motion to dismiss, a court's review is generally limited to
16 the contents of the complaint, with all allegations of material fact taken as true and
17 construed in the light most favorable to the plaintiff. *Enesco Corp. v. Price/Costco,*
18 *Inc.*, 146 F.3d 1083, 1085 (9th Cir. 1998). However, allegations in the complaint
19 need not be accepted as true if they are merely conclusory, unwarranted deductions
20 of fact, or unreasonable inferences (*Sprewell v. Golden State Warriors*, 266 F.3d
21 979, 988 (9th Cir. 2001)), or if they contradict matters properly subject to judicial
22 notice or by exhibit attached to the complaint. *Mullis v. United States Bankruptcy*
23 *Court*, 828 F.2d 1385, 1388 (9th Cir. 1987); *See Durning v. First Boston Corp.*, 815
24 F.2d 1265, 1267 (9th Cir. 1987). Matters of public record may be considered,
25 including pleadings, orders, and other papers filed with the court or records of
26 administrative bodies. *See Mack v. South Bay Beer Distributors*, 798 F.2d 1279,
27 1282 (9th Cir. 1986). In addition, a defendant may attach to a Rule 12(b)(6) motion
28

any document referred to in a complaint, to show that the document(s) do(es) not support the plaintiff's claim. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994); *overruled on other grounds as recognized in Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1127 (9th Cir. 2002). Thus, a court may consider facts alleged in the complaint, documents attached to the complaint, documents relied upon in but not attached to the complaint when authenticity is not contested, and judicially noticeable documents. *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1988).

V. LEGAL ARGUMENT

Each of Plaintiff's claims should be dismissed as a matter of law, without leave to amend. The claims as alleged are: (1) barred by immunities and (2) insufficient to state a claim upon which relief can be granted.

A. PLAINTIFF'S FIRST CLAIM² FAILS AS A MATTER OF LAW

1. Plaintiff Has Failed to State a Claim for Relief against Captain Cox

The Court must dismiss a claim for relief where the plaintiff has failed to allege "enough facts to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 697, 129 S.Ct. 1937 (2009). A pleading must contain "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1974 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932 (1986)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. 662, 678. "The plausibility standard is not akin to a 'probability requirement' but it asks for more than a sheer possibility that a defendant has acted unlawfully" or "facts that are 'merely consistent with' a defendant's liability." *Id.*

² Plaintiff refers to his counts as causes of action in the SAC.

1 Plaintiff's SAC contains insufficient allegations against Captain Cox to
 2 support a First Amendment retaliation claim. The totality of the factual allegations
 3 ascribed to each of them in the SAC are as follows:

4 **Captain Cox**

- 5 • Captain Cox knew the investigation was improper. SAC, ¶ 20.
- 6 • Captain Cox knew he could not punish Plaintiff was participating in a
 7 political rally. SAC, ¶ 20.
- 8 • He and Chief Swing designed the investigation to back through years
 9 of social media posts. SAC, ¶ 20.
- 10 • He and Chief Swing hired a law firm to conduct the investigation.
 11 SAC, ¶ 21.
- 12 • He disparaged Plaintiff during the termination process. SAC, ¶ 24.

13 Other than these threadbare allegations, Plaintiff does not allege what actions
 14 Captain Cox took that will allow this Court to draw the inference that he violated
 15 Plaintiff's civil rights. Plaintiff's SAC alleges that the complaints about Plaintiff's
 16 social media posts came from other officers (not Captain Cox), the investigation
 17 was conducted by a law firm, and Chief Swing tried to fire Plaintiff. All of
 18 Plaintiff's allegations, including those listed above, fall within the ambit of the first
 19 working principle underlying *Twombly*, namely that the Court need not accept legal
 20 conclusions. Plaintiff's allegations do not even allege that Captain Cox took any
 21 action against Plaintiff in retaliation for his purported protected speech. Plaintiff has
 22 alleged no facts to support his conclusion that the Captain Cox can be personally
 23 liable for a violation of his First Amendment rights. Plaintiff has not "state[d] a
 24 claim to relief that is plausible on its face," and the Court should dismiss Captain
 25 Cox from this lawsuit.

26 ///

27 ///

1 **2. The Individual Defendants are Entitled to Qualified**
 2 **Immunity**

3 The doctrine of qualified immunity provides that “government officials
 4 performing discretionary functions generally are shielded from liability for civil
 5 damages insofar as their conduct does not violate clearly established statutory or
 6 constitutional rights of which a reasonable person would have known.” *Harlow v.*
 7 *Fitzgerald*, 457 U.S. 800, 818 (1982). Determining whether qualified immunity
 8 applies involves a two-step inquiry: (1) if the facts alleged show that the official’s
 9 conduct violated a constitutional right; and (2) whether the right was clearly
 10 established. *Saucier v. Katz*, 533 U.S. 194, 201 (2001), abrogated in part on other
 11 grounds by *Pearson v. Callahan* 555 U.S. 223 (2009). Qualified immunity is “an
 12 entitlement not to stand trial or face the other burdens of litigation.” *Saucier*, 533
 13 U.S. at 200 (internal quotes omitted). Therefore, qualified immunity questions
 14 should be resolved “at the earliest possible stage in litigation.” *Pearson*, 555 U.S. at
 15 232. Accordingly, it is proper for the Court to consider and grant a request for
 16 qualified immunity at the Fed. R. Civ. P. 12(b)(6) stage.

17 The qualified immunity test “ ‘allows ample room for reasonable error on the
 18 part of the [governmental official]’.” *Brewster v. Bd. of Educ. of Lynwood Unified*
 19 *Sch. Dist.*, 149 F.3d 971, 976 (9th Cir. 1998) (quoting *Knox v. Southwest Airlines*,
 20 124 F.3d 1103, 1107 (9th Cir. 1997)).

21 Qualified immunity safeguards ‘all but the plainly
 22 incompetent or those who knowingly violate the law.’” ...
 23 “[I]f officers of reasonable competence could disagree on
 24 th[e] issue [whether a chosen course of action is
 25 constitutional], immunity should be recognized.’

26 *Id.*

27 “In the [public] employment context, the required adverse action in a
 28 retaliation claim is an ‘adverse employment action.’” *Bennett v. Hendrix*, 423 F.3d
 1247, 1250 (11th Cir. 2005). An action constitutes an adverse employment action in

1 a First Amendment retaliation case if the “alleged employment action would likely
2 chill the exercise of constitutionally protected speech.” *Akins v. Fulton Cty.*, 420
3 F.3d 1293, 1300 (11th Cir. 2005). The complained-of action must also involve an
4 important condition of employment. *Id.*

5 In sum, Plaintiff claims that Chief Swing received a memo from a sergeant
6 alleging that Plaintiff was a member of the “Proud Boys” political group that was
7 accused of organizing the January 6, 2021 attempted insurrection. Then, on January
8 10, 2021, an anonymous complaint was sent to the City complaining about
9 Plaintiff’s attendance at the Sacramento rally on January 6, 2021. Plaintiff was
10 placed on leave, and then in March 2021, an internal affairs investigation was
11 launched.

12 Plaintiff claims that the City then used that time to dig through Plaintiff’s
13 social media accounts. However, as noted from the SAC (§§ 12-17) and arbitration
14 award attached to the SAC (Ex. A at p. 2-3), it was other City police officers, not
15 Chief Swing or Captain Cox, who submitted the social media posts to the City in
16 the memo and anonymous. As alleged in the SAC, an independent law firm
17 conducted the internal affairs investigation, ultimately sustaining two of the
18 allegations against Plaintiff. Importantly, neither of the sustained allegations had
19 anything to do with any of Plaintiff’s conduct on January 6, 2021. See SAC, at Ex.
20 A, p. 4. Plaintiff then concludes that his subsequent termination, since overturned in
21 arbitration under the applicable MOU, for the two violations of policies was really
22 motivated by Plaintiff’s attendance at a Sacramento rally on January 6, 2021.
23 Plaintiff also claims that his First Amendment rights were violated for social media
24 posts made before he was an employee of the City.

25 Per the SAC, Chief Swing and Captain Cox did not submit the initial
26 complaints, which formed the basis of the internal affairs investigation. Thus, those
27 activities cannot support a violation of Constitutional rights. Plaintiff alleges
28

1 without any factual support that Captain Cox designed the investigation to review
 2 old social media posts, even though we know the complaints were submitted by
 3 other officers and an outside law firm conducted the investigation.

4 Here, the only claims of adverse treatment were an internal affairs
 5 investigation ordered by Chief Swing and termination recommended by Chief
 6 Swing. As discussed more thoroughly below, Chief Swing does not have final
 7 decision-making power. However, for this analysis, any claim against Captain Cox
 8 can be disposed of. Plaintiff does not allege any act by Captain Cox taken that was
 9 adverse to Plaintiff, beyond vague conclusions, but there is no allegation that
 10 Captain Cox even had the power to take the adverse actions alleged.

11 As for the second part of the analysis, whether a right is clearly established,
 12 the answer depends on “whether it would be clear to a reasonable officer that his
 13 conduct was unlawful in the situation he confronted.” *Saucier*, 533 U.S. at 202.
 14 Rights are clearly established when “every reasonable official would have
 15 understood that what he is doing violates that right.” *Andrews v. City of Henderson*,
 16 35 F.4th 710, 718 (9th Cir. 2022) (citation omitted). The Supreme Court “has
 17 repeatedly told courts . . . not to define clearly established law at a high level of
 18 generality,” *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018), but there “can be the
 19 rare ‘obvious case,’ where the unlawfulness of the officer’s conduct is sufficiently
 20 clear even though existing precedent does not address similar
 21 circumstances,” *District of Columbia v. Wesby*, 583 U.S. 48, 64, 138 S. Ct. 577
 22 (2018) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199, 125 S. Ct. 596 (2004) (per
 23 curiam)). “[T]here need not be a Supreme Court or circuit case ‘directly on point,’
 24 but ‘existing precedent must place the lawfulness of the conduct beyond
 25 debate.’” *Ballou v. McElvain*, 29 F.4th 413, 421 (9th Cir. 2022) (quoting *Tobias v.*
 26 *Arteaga*, 996 F.3d 571, 580 (9th Cir. 2021)). “[W]e ‘may look to decisions from the
 27 other circuits’ to determine whether they reflect a ‘consensus of courts’ that can be
 28

1 said to clearly establish the relevant law.” *Shooter v. Arizona*, 4 F.4th 955, 963 (9th
 2 Cir. 2021) (quoting *Martinez v. City of Clovis*, 943 F.3d 1260, 1276 (9th Cir.
 3 2019)).

4 Here, Plaintiff has not alleged any facts suggesting that the Individual
 5 Defendants should have been aware that their alleged actions violated Plaintiff’s
 6 “clearly established” constitutional rights. Plaintiff does not have a right to violate
 7 City and PPD policies and that is what was alleged in the termination. As noted
 8 above, Plaintiff makes virtually no allegations against Captain Cox. He then alleges
 9 in a conclusory manner that Chief Swing made the decision to fire Plaintiff in
 10 violation of Plaintiff’s rights. Then, Plaintiff alleges he successfully had his
 11 termination based on violation of City policies overturned. There are simply no
 12 facts pleaded as to why the Individual Defendants should have known that firing an
 13 employee for a violation of City policies was a clearly established constitutional
 14 right.

15 Plaintiff’s allegations do not support a constitutional violation since Plaintiff
 16 only alleges conclusions. Consequently, the Individual Defendants are entitled to
 17 qualified immunity from Plaintiff’s First Amendment claim.

18 **B. PLAINTIFF’S SECOND CLAIM HAS NOT ESTABLISHED**
 19 **MUNICIPAL LIABILITY**

20 To plead a section 1983 violation, Plaintiff must allege facts from which the
 21 Court may infer that: (1) he was deprived of a federal right; and (2) a person or
 22 entity who committed the alleged violation acted under color of state law. *West v.*
 23 *Atkins*, 487 U.S. 42, 48 (1988); *Williams v. Gorton*, 529 F.2d 668, 670 (9th Cir.
 24 1976). A plaintiff must allege that they suffered a specific injury and show a causal
 25 relationship between the defendant’s conduct and the injury allegedly suffered by
 26 the plaintiff. *See Rizzo v. Goode*, 423 U.S. 362, 371–72, 377 (1976). As with other
 27 complaints, conclusory allegations unsupported by facts are insufficient to state a
 28

1 civil rights claim under section 1983. *Burns v. County of King*, 883 F.2d 819,
 2 821 (9th Cir. 1989) (per curiam) (holding that plaintiff's claims of a conspiracy to
 3 violate his constitutional rights under section 1983 failed because they were
 4 supported only by conclusory allegations).

5 A municipality may be held liable under section 1983 “when execution of a
 6 government’s policy or custom, whether made by its lawmakers or by those whose
 7 edicts or acts may fairly be said to represent official policy, inflicts the
 8 injury.” *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978).

9 Municipal liability may attach if an employee commits an alleged constitutional
 10 violation “pursuant to a formal governmental policy or a ‘longstanding practice or
 11 custom which constitutes the standard operating procedure....’ ” *Gillette v.*
 12 *Delmore*, 979 F.2d 1342, 1346 (9th Cir. 1992), *cert. denied*, 510 U.S. 932 (1993).

13 A local governing body can be sued directly under section 1983 for monetary,
 14 declaratory or injunctive relief when the allegedly unconstitutional act “implements
 15 or executes a policy statement, ordinance, regulation, or decision officially adopted
 16 and promulgated by that body’s officers.” *Monell*, 436 U.S. at 690. Municipalities
 17 may be subject to damages when the plaintiff was injured pursuant to the decision
 18 of a “final policymaker.” *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1066 (9th
 19 Cir. 2013). For liability through ratification, Plaintiff must show it was “the
 20 product of a conscious, affirmative choice to ratify the conduct in
 21 question.” *Lassiter v. City of Bremerton*, 556 F.3d 1049, 1055 (9th Cir. 2009).

22 Here, Plaintiff describes the actions that led to his termination; however,
 23 there are only conclusory statements that one of the Individual Defendants, Chief
 24 Swing, had policymaking authority. SAC ¶¶ 41-45. Despite Plaintiff’s conclusory
 25 allegation to the contrary, Chief Swing was not a final policy-maker.

26 State law determines whether an official is a policymaker for *Monell*
 27 purposes. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988). California
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permits municipalities to enact regulations creating a “city manager” form of governance. Cal. Gov’t Code § 34851. Here, Pleasanton’s Municipal Code establishes that the “city manager shall be the administrative head of the government ... [and] shall be responsible for the efficient administration of all the affairs of the city which are under her or her control.” See RJN, Ex. A, at Pleasanton Muni. Code section 2.08.070. Further, it “shall be the duty of the city manager and the city manager shall have the authority to control, order and give directions to all heads of departments and to subordinate officers and employees of the city...” See RJN, Ex. A, at Pleasanton Muni. Code section 2.08.090. Thus, Chief Swing cannot be considered a policymaker under *Monell* because, per the Pleasanton Municipal Code, he reports to the City Manager.

As for the acting City Manager, Plaintiff only submits mere conclusions of law that the act of termination was ratified. See *Ellins*, 710 F. 3d at 1066-1067 [even though City Manager knew about Chief of Police’s delay in signing POST application, there was no allegation the delay was in retaliation for protected speech or that the City Manager ratified that decision on that basis]. Plaintiff merely states, “[t]he City Manager also knew about and ratified the decision...” SAC, ¶ 24.³ There is simply nothing more alleged beyond conclusions that the City Manager actually ratified any decision on the basis of violating First Amendment Rights. Plaintiff’s allegations are insufficient to establish that the City can be held liable for a violation of Plaintiff’s constitutional rights that can be attributed to the City for purposes of liability.

Additionally, there are no allegations to support municipal liability under any other theory under *Monell*. Plaintiff is alleging an individualized harm resulting from his termination, which was later overturned. Nothing about the City’s actions were related to an unconstitutional policy. Plaintiff focuses on the legitimate

³ Also, see ¶ 43, “City Manager knew about the unlawful actions ... and ratified the decision.”

actions of Captain Cox and Chief Swing without connecting them to a constitutional violation. Indeed, there are no allegations that the ultimate decision-maker and only person who by law can be a policymaker, either took any actions to violate Plaintiff's constitutional rights or any facts to show that the City Manager took any conscious action to violate Plaintiff's constitutional rights. It was the legitimate exercise of authority by the City to investigate and ultimately seek termination an employee for violation of policies.

Nor does the SAC support municipal liability through custom or a failure to train. "Custom" is a "a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law." *Praprotnik*, 485 U.S. at 127. Evidence of a single act or random acts are insufficient to establish a custom or policy. *Navarro v. Block*, 72 F.3d 712, 714 (9th Cir. 1995). A municipality is only liable for injuries caused by an alleged failure to train where a plaintiff can show that municipal officials were deliberately indifferent to the rights of the persons with whom the offending employees were likely to come into contact. *City of Canton, Ohio v. Harris*, 489 US 378, 388 (1989).

Here, Plaintiff does not allege any custom or failure to train in the SAC. Plaintiff does not allege that other employees have been subjected to similar employment consequences. Rather than a failure to train, the SAC refers to Plaintiff being investigated and subsequently terminated for violations of City and PPD policies. Importantly, while Plaintiff alleges that his termination was for his political activity, the SAC acknowledges that Plaintiff was exonerated for the related allegation. Far from a custom or failure to train, this is an example of a City applying its policies in deciding to terminate an employee. Since Plaintiff has not sufficiently alleged a basis for municipal liability under *Monell*, the section 1983 claim against the City should be dismissed without leave to amend.

1 **VI. CONCLUSION**

2 Based on the foregoing, Defendants respectfully request that the Court
3 dismiss Plaintiff's Second Amended Complaint in its entirety without leave to
4 amend. Alternatively, Defendants request that Plaintiff be required to submit a more
5 definite statement.

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7 Dated: January 23, 2024

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